No. 87-998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J.A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NOW LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND WOMEN'S LEGAL DEFENSE FUND IN SUPPORT OF THE APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	5
ARGUMENT	8
I. THE CONSTITUTION DOES NOT FORBID STATE AND LOCAL GOVERNMENTS FROM TAKING RACE-CONSCIOUS ACTION TO CURE DISCRIMINATION AND ITS EFFECTS IN INDUSTRIES WITH WHICH THEY DO BUSINESS	8
A. State and Local Governments, Like Congress, May Constitutionally Undertake Affirmative Action to Cure the Effects of Past Discrimination Whether or Not They Have Participated in Such Discrimination	8
B. State and Local Governments Participate in Discrimination When They Award Contracts to a Construction Industry Characterized by Discrimination	13
II. THE FOURTH CIRCUIT IMPROPERLY HELD THAT RICHMOND HAD NO FIRM BASIS FOR BELIEVING REMEDIAL ACTION WAS REQUIRED	16
A. The District Court's Finding that the City Had Adequate Support for Believing that Its Public Contracting Awards Were Perpetuating Effects of Discrimination Should Be Sustained	18
B. The Council Had a Reasonable Basis to Believe that the City Itself Had Discriminated	22

TABLE OF CONTENTS—Continued

Page

III. THE RICHMOND PLAN IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL GOAL OF ENDING RACIAL EXCLUSION IN PUBLIC CONTRACTING 24

A. The City Council Considered Alternatives.... 25

B. The Set-Aside Program Is Limited in Duration 26

C. The Council Selected a Reasonable Figure for the Set-Aside Percentage 26

D. The Richmond Plan Provides for an Adequate Waiver 27

E. The Burden on Non-Minorities Is Consistent with Fundamental Fairness 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page

Anderson v. *Bessemer City*, 470 U.S. 564 (1985).. 18
Assoc. Gen. Contr. of Cal. v. *City & County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).... 12
Board of Directors of Rotary International v. *Rotary Club of Duarte*, 107 S. Ct. 1940 (1987).. 14
Bradley v. *School Board of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965), *vacated on procedural grounds*, 382 U.S. 103 (1965) 3
Bradley v. *School Board of Richmond, Virginia*, 462 F.2d 1058 (4th Cir. 1972), *aff'd*, 412 U.S. 92 (1973) 24
Burton v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) 15
Carson v. *American Brands, Inc.*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79 (1981)..... 3
City of Richmond v. *United States*, 422 U.S. 358 (1975) 24
City of Rome v. *United States*, 446 U.S. 156 (1980) 14
Constructors Assoc. of Western Pa. v. *Kreps*, 441 F. Supp. 936 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (1978) 26
Denton v. *International Broth. of Boilermakers*, 650 F. Supp. 1151 (D. Mass. 1986) 22
Ethridge v. *Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967) 14-15
Evans v. *Laurel Links, Inc.*, 261 F. Supp. 474 (1966) 3
Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) 24
Fullilove v. *Kreps*, 584 F.2d 600 (2d Cir. 1978), *aff'd sub nom. Fullilove* v. *Klutznick*, 448 U.S. 448 (1980) ..... *passim*
Grant v. *Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) 22
J. A. Croson Co. v. *City of Richmond*, 779 F.2d 181 (4th Cir. 1985), *vacated and remanded*, 106 S.Ct. 3327 (1986), *on remand*, 822 F.2d 1355 (1987) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Johnson v. *Transp. Agency, Santa Clara Cty., Cal.*, 107 S. Ct. 1442 (1987) ..... *passim*
Local 28 of Sheet Metal Workers v. *E.E.O.C.*, 478 U.S. 421, 106 S. Ct. 3019 (1986) 5
Local Number 93 v. *City of Cleveland*, 478 U.S. 501, 106 S. Ct. 3063 (1986) 5
Local Union No. 35, Etc. v. *City of Hartford*, 625 F.2d 416 (2d Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) 22
Michigan Road Builders Ass'n, Inc. v. *Milliken*, 834 F.2d 583 (6th Cir. 1987) 12
National Black Police Ass'n, Inc. v. *Velde*, 712 F.2d 569 (D.C. Cir. 1983) *cert. denied*, 446 U.S. 963 (1984) 15
Ohio Contractors Ass'n v. *Keip*, 713 F.2d 167 (6th Cir. 1983) 18
Patterson v. *American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980), *vacated*, 456 U.S. 63 (1982) 3
Percy v. *Brennan*, 384 F. Supp. 800 (S.D. N.Y. 1977) 15
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982) .. 18, 24
Quarles v. *Philip Morris, Incorporated*, 279 F. Supp. 505 (E.D. Va. 1968) 3
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 14
Schmidt v. *Oakland Unified School Dist.*, 662 F.2d 550 (9th Cir. 1981), *vacated and rev'd*, 457 U.S. 594 (1982) 13, 20, 27
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 14
South Fla. Chap. v. *Metropolitan Dade County, Fla.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) 20, 27
Southwest Washington Chapt., Nat'l Elec. Contr. Assn. v. *Pierce Cty.*, 667 P.2d 1092 (Wash. 1982) 18, 27
Steelworkers v. *Weber*, 443 U.S. 193 (1979) ..... *passim*
Teamsters v. *United States*, 431 U.S. 324 (1977) .. 19-20
United Jewish Organizations v. *Carey*, 430 U.S. 144 (1977) 6

TABLE OF AUTHORITIES—Continued

Page

United States v. *Paradise*, 107 S. Ct. 1053 (1987) ..*passim*
University of California Regents v. *Bakke*, 438 U.S. 265 (1978) .....*passim*
Wygant v. *Jackson Board of Education*, 476 U.S. 267 (1986) .....*passim*

Constitutions, statutes, and regulations:

U.S. Const. amend. XIV .....*passim*
Public Works Employment Act of 1977, Pub. L. No. 95-28, § 103(f)(2), 91 Stat. 116, 117 (codified at 42 U.S.C. § 6705(f)(2) (1982)) 2
F.R. Civ. P. 52(a) 18
45 Fed. Reg. 65976 *et seq.* (Oct. 3, 1980) 21, 27
Virginia Public Procurement Act, § 11-48, Va. Code Ann. § 11-48 (1984) 5
Human Rights, Richmond, Va., Code § 17.2 (1975) 5
Minority Business Utilization Plan, § 27.10-20, art. VIII-A, Richmond, Va., Ordinance 83.69-59 (April 11, 1983) .....*passim*

Miscellaneous:

Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985) 13

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INTEREST OF *AMICI CURIAE* [1]

The five *amici curiae* who submit this brief [2] have often appeared in this Court, both as *amici* and on behalf of minorities and women, in civil rights cases involving discrimination in voting, education, employment and housing. They have a direct interest in supporting the principle that, consistent with the Equal Protection Clause, state and local governments may establish reme-

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[1] Pursuant to Rule 36.2, written consents of the parties to the submission of this brief have been filed with the Clerk of the Court.

[2] A description of each amicus organization is set forth in Appendix No. 1.

dial programs to eradicate discrimination and the continuing effects of prior discrimination. The experience of the *amici* in a broad range of discrimination and affirmative action litigation may enable *amici* to illuminate for the Court some of the issues presented by this case.

STATEMENT OF THE CASE

This case involves the constitutionality of the Minority Business Utilization Plan adopted by the City of Richmond.[3] We generally adopt the statement of the case provided by Richmond in its brief. What follows represents an amplified description of the City Council proceedings leading to adoption of the plan.

In 1977, the Congress adopted a Minority Business Enterprise ("MBE") set-aside plan as part of the Public Works Employment Act of 1977. 42 U.S.C. § 6705(f)(2) (1982). This statute required state and local government applicants for federal public works funds to guarantee that 10% of the funds would be expended through MBEs. Shortly thereafter, this Court upheld against constitutional challenge Congress' choice of the MBE plan "to ensure that [minority firms] were not denied equal opportunity to participate in federal grants to state and local governments . . . ." *Fullilove* v. *Klutznick*, 448 U.S. 448, 478 (1980) (plurality).

Following the national lead, the Richmond City Council undertook an examination of the exclusion of minorities from participation in its own public contracting. Council members had been concerned about minority participation in public contracting for some time. Votes on a remedial set-aside at two meetings were postponed allowing further research and analysis. J.A. 25-27.

During the postponements, council members, city administrators and the city attorney worked on the matter

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[3] Minority Business Utilization Plan, § 27.10-20, art. VIII-A, Richmond, Va., Ordinance 83.69-59 (April 11, 1983) (hereinafter "ordinance" or "plan"). Reproduced in Supplemental Appendices to the Jurisdictional Statement. J.S. Supp. App. 233-58.

over "a number of sessions." J.A. 26-27. Their work included review of city construction contracts for the previous five-year period and analysis of *Fullilove* and other decisions passing on the legality of set-aside programs of various configurations. J.A. 14-16, 24-27, 43. On April 11, 1983, after hearing and public debate, the Council adopted the Minority Business Utilization Plan.[4]

The City Council's purpose in enacting the ordinance was explicitly "remedial . . . for the purpose or [sic] promoting wider participation by minority business enterprises in the construction of public projects, either as general contractors or subcontractors."[5] Councilman Henry Marsh, a sponsor of the ordinance, stated, in urging adoption of the set-aside plan, that the Richmond construction industry was characterized by racial discrimination and "exclusion on the basis of race" and that the need for remedial action was "not open to question." J.A. 41.[6] These views were echoed by the City Manager, Manuel Deese. J.A. 42. Statistics presented to the Coun-

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[4] Richmond was not alone in this approach. Since *Fullilove*, at least 32 states and 160 local governments have adopted minority set-aside requirements as part of their public contracting programs. See Motion for Leave To File Brief of the National League of Cities, *et al.*, in *Richmond* v. *Croson Co.*, No. 87-998, dated January 16, 1988, at p. 2.

[5] Quoting the text of the ordinance as reproduced in an appendix to the opinion of the District Court. J.S. Supp. App. 248.

[6] In formulating and supporting the plan, Mr. Marsh drew on 22 years of experience in Richmond as a practicing attorney, Mayor and member of the City Council. He had accumulated detailed knowledge of the extent and effects of racial discrimination by private and public entities in Richmond as lead counsel for plaintiffs in numerous lawsuits, including: *Patterson* v. *American Tobacco Co.*, 634 F.2d 744 (4th Cir. 1980), *vacated*, 456 U.S. 63 (1982) (employment); *Carson* v. *American Brands, Inc.*, 606 F.2d 420 (4th Cir. 1979), *rev'd*, 450 U.S. 79 (1981) (employment); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) (employment); *Evans* v. *Laurel Links, Inc.*, 261 F.Supp. 474 (E.D. Va. 1966) (public facilities); *Bradley* v. *School Board of Richmond, Virginia*, 345 F.2d 310 (4th Cir. 1965), *vacated on procedural grounds*, 382 U.S. 103 (1965) (education).

cil showed that, from 1978 to 1983, when Richmond had a minority population of 50%, two-thirds of 1% of the $124 million of public construction contracts let had been awarded to minorities. J.A. 12, 18, 41, 43.

Seven persons testified before the City Council on the set-aside plan, including representatives of various associations of contractors opposing the proposal. J.A. 17-40. None of those witnesses disputed either the fact of past racial discrimination in the Richmond construction industry or its continuing effects. Nor did any witnesses dispute the remedial purpose of the set-aside plan. Rather, these witnesses expressed concern over the lack of local minority subcontractors, the possibility that sham minority businesses would be awarded subcontracts, the potential that the plan would lead to increased construction costs, and the plan's possible anti-competitive effects. J.A. 20, 28, 31-36, 38-39.

Aware that this Court had approved a set-aside plan, the authors of the Richmond plan carefully modeled it after the federal one approved in *Fullilove*. J.A. 14-16, 24-27. The Council included a waiver and limited the plan's duration. J.A. 12, 14-15. The city attorney explained:

> "The reason for that and the suggestion that a date be put in, was that the federal cases that approved this sort of set-up have said that it's remedial legislation, and the purpose is to remedy past discrimination. And hopefully, in some period of time, this program will cause that to happen. Five years was deemed to be a period of time with which that would happen in all likelihood. It can be judged at that time and either continued—it may expire before that. It's an ordinance that can be amended by Council at any time. That was deemed to be a fair date to evaluate the effects of the program rather than leave it open-ended." J.A. 14-15.

The Council considered the efficacy of the set-aside as a remedy for the present effects of past discrimination. An ordinance prohibiting race discrimination in the

award of city contracts had been on the books since 1975,[7] yet the facts showed that minorities had nonetheless been essentially excluded from public contracts from 1978 through 1983. In contrast, Council was advised that the city's community development block grant program had utilized a set-aside requirement and achieved participation by minorities exceeding the goals of that plan. J.A. 41; *see also* J.A. 12-13, 16.

The Council was also aware that other cities, including Oakland, Cleveland, Toledo, and Boston, had adopted minority set-aside programs similar to the plan before it. J.A. 16, 18-19. In addition, the Legislature of the State of Virginia in 1982 had authorized public bodies to establish programs to facilitate minority participation.[8] The State also had established a Department of Minority Public Enterprise.[9]

INTRODUCTION AND SUMMARY OF ARGUMENT

This case calls upon the Court to consider once again the vexing issue of race-conscious remedies for the present effects of discrimination.[10] These remedies have been considered necessary to avoid perpetuating the effects of past discrimination.[11] Yet, the Court has recognized that

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[7] Human Rights, Richmond, Va. Code § 17.2 (1975), attached hereto as Appendix No. 2.

[8] Virginia Public Procurement Act, § 11-48, Va. Code Ann. § 11.48 (1984).

[9] *Id.*

[10] *See, e.g., United States* v. *Paradise*, 107 S.Ct. 1053 (1987); *Johnson* v. *Transp. Agency, Santa Clara Cty., Cal.*, 107 S.Ct. 1442 (1987); *Local Number 93* v. *City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063 (1986); *Local 28 of Sheet Metal Workers* v. *E.E.O.C.*, 478 U.S. 421, 106 S.Ct. 3019 (1986); *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986); *Fullilove, supra*; *Steelworkers* v. *Weber*, 443 U.S. 193 (1979); *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978).

[11] *E.g., Wygant*, 476 U.S. at 280-82 (plurality).

such remedies, focusing as they do on race, are themselves problematic.[12]

Perhaps because of the clash of these competing values, the affirmative action cases that have come before the Court have generally been resolved by combinations of concurring opinions applying differing constitutional tests. Although the requirements of these tests differ, they reflect the common objective of achieving an appropriate balance between substantial but competing rights. Three types of such requirements are significant to the resolution of this case: (1) limitations on the kinds of discrimination a government may take affirmative action to remedy, (2) requirements for supporting evidence that the requisite discriminatory effects exist, and (3) requirements that the remedy be "narrowly tailored" to achieve its purpose.

The uncertainty created by the absence of a single approach in affirmative action cases was minimized in *Fullilove*, where six members of the Court approved the challenged minority set-aside. While the concurring Justices employed differing requirements, each opinion exhibited a sensitivity to the particular context and avoided categorical rules that would skew the balance of important interests involved.

The remedial program challenged here, like numerous similar state and local programs, was adopted, and approved by the District Court, in compliance with the most restrictive standard articulated by the Justices concurring in *Fullilove*, the strict scrutiny applied by Justice Powell.

We show below that the Fourth Circuit reversed the District Court on the basis of principles derived from the plurality opinion in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986). *Wygant*, however, dealt with governmental action dissimilar in purpose, operation and

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[12] *E.g.*, *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 172-75 (1977) (Brennan, J., concurring in part).

impact on non-minorities. The Fourth Circuit opinion effectively abandons the balance struck in *Fullilove* and should be reversed.

1. The Court of Appeals held that the City could adopt a set-aside plan only to remedy its own past discrimination. This categorical limitation, not imposed in *Fullilove*, adds no significant protection against abuse yet would prohibit a uniquely effective remedy for identified discrimination in the City's construction industry. This Court should reject it. In any event, the City of Richmond should be permitted to adopt the plan to avoid perpetuating the effects of that discrimination in its public contracting.

2. The Court of Appeals' restrictive review of the evidence supporting Richmond's plan disregarded this Court's precedents and usurped the fact-finding function of the District Court. The District Court properly found that the evidence supported Richmond's action. If this Court should change the applicable law and then conclude that the District Court findings are inadequate, the case should be remanded for further fact-finding by the District Court.

3. The Court of Appeals employed an analysis inconsistent with this Court's precedents in holding that Richmond's plan was not "narrowly tailored." Richmond's plan meets the tailoring requirements identified in this Court's cases.

The limits imposed by the Fourth Circuit have no sound analytical foundation, contradict the persuasive and authoritative holding joined by six Justices in *Fullilove*, and would upset the structure of remedial action by state and local governments that has been erected on the foundation of *Fullilove* over almost a decade.

ARGUMENT

I. THE CONSTITUTION DOES NOT FORBID STATE AND LOCAL GOVERNMENTS FROM TAKING RACE-CONSCIOUS ACTION TO CURE DISCRIMINATION AND ITS EFFECTS IN INDUSTRIES WITH WHICH THEY DO BUSINESS.

The Court of Appeals held Richmond's set-aside plan unconstitutional because the Council lacked "a firm basis for believing that such action was required based on prior discrimination by the locality itself." 822 F.2d at 1360. That Court believed that the plurality in *Wygant* required "prior discrimination *by the government unit involved*" before an affirmative action plan could be upheld. *Id.* at 1358, quoting 476 U.S. at 274 (plurality) (emphasis added by Fourth Circuit). But *Wygant* imposed no such requirement. Furthermore, if such a requirement were appropriate, it is satisfied when state and local governments award contracts to a construction industry they know is characterized by discrimination.

A. State and Local Governments, Like Congress, May Constitutionally Undertake Affirmative Action to Cure the Effects of Past Discrimination Whether or Not They Have Participated in Such Discrimination.

This Court has recognized that both Congress and state governments have a substantial interest in remedying the continuing effects of discrimination.[13] The Court,

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[13] *E.g.*, *Bakke*, 438 U.S. at 307 (Powell, J.) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination"); *id.* at 369 (Brennan, White, Marshall, Blackmun, JJ.) ("a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large"); *Fullilove*, 448 U.S. at 473 (plurality) (objective of ensuring that grantees electing to participate in Federal program "would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or fore-

however, has not reached agreement on the kinds of discrimination that justify use of race-conscious remedies. Among the Justices approving such remedies, Justice Powell has applied the most restrictive test. In his opinions in *Bakke* and *Fullilove*, Justice Powell wrote that race-conscious remedies that aid some persons "at the expense of other innocent individuals" can be justified only to cure the effects of "identified discrimination" as opposed to " 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past"; and that such remedies must be based on "judicial, legislative, or administrative findings of constitutional or statutory violations." *University of California Regents* v. *Bakke*, 438 U.S. 265, 307 (1978); *see Fullilove*, 448 U.S. at 497-98 (Powell, J., concurring).[14]

Notably absent from Justice Powell's formulation was any requirement that the "identified discrimination" found by the authoritative body be attributable to the governmental unit adopting the remedy. Indeed, in *Fullilove*, Justice Powell found his "strict scrutiny" requirements satisfied by congressional findings of actions by private parties and governmental units other than Congress—actions that would, "depending upon the identity of the discriminating party, violate Title VI of the Civil

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closed access by minority businesses to public contracting opportunities" is within congressional power); *id.* at 497 (Powell, J.) (citing *Bakke*, 438 U.S. at 307); *Paradise*, 107 S.Ct. at 1064 (plurality) ("It is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. [citations omitted].").

[14] Justices Brennan, White, Marshall, and Blackmun and Chief Justice Burger all recognized that race-conscious remedies require some heightened scrutiny. *Bakke*, 438 U.S. at 358-62 (Brennan, White, Marshall, Blackmun, JJ.); *Fullilove*, 448 U.S. at 480 (Burger, C. J.); *id.* at 519 (Marshall, J.). These Justices took the position in those opinions, however, that the concerns requiring heightened scrutiny could be adequately taken into account without the special limitations imposed by Justice Powell.

Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, or 42 U.S.C. § 1981, or the Fourteenth Amendment." 448 U.S. at 506. Justice Stewart complained in dissent that "there is no evidence that Congress has in the past engaged in racial discrimination in its disbursement of federal contracting funds." *Id.* at 528.

In *Wygant*, Justice Powell applied his test to a collective bargaining agreement between a school board and a teachers' union that required, in the event of layoffs, that more senior non-minority employees be laid off before minority employees. The purpose of this provision was to preserve the attainments of an affirmative action hiring program. The lower courts, effectively by-passing the issue whether the school board had itself discriminated, upheld the lay-off provision on the basis of a need for minority "role-models" on the faculty to remedy the effects of "societal discrimination." 476 U.S. at 274. The number of desired role-models was keyed to the percentage of minority students. *Id.* In rejecting the "role-model" justification, Justice Powell stated:

> "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." *Id.*

The Fourth Circuit interpreted this language to add to the standard announced by Justice Powell in *Bakke* and applied in *Fullilove* a requirement that the "identified discrimination" be discrimination by the governmental unit undertaking the affirmative action. 822 F.2d at 1358. But neither Justice Powell, nor Justice O'Connor, who stated the new requirement less ambiguously,[15]

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[15] *Wygant*, 476 U.S. at 288 (defining "societal discrimination" as discrimination not traceable to [the governmental unit's] own actions").

acknowledged any intention to change the standard or made any attempt to distinguish *Fullilove* or to articulate what useful purpose was served by the additional limitation.

We believe the most likely explanation for the language in *Wygant* relied on by the Court of Appeals lies in the particular facts of that case. Discrimination by the school board itself was the most obvious, if not the only, "identifiable" discrimination in the materials before the Court. The Court simply did not have before it the situation that was presented in *Fullilove* and is presented by this case—identifiable discrimination by a party other than the governmental unit adopting the remedy.[16] The requirement of findings of "identified discrimination," without the further limitation to discrimination by the governmental unit undertaking the plan, adequately satisfies Justice Powell's concern that the "role model theory" and comparison of the percentages of minority faculty and students were insufficient predicates for the race-conscious action.[17]

The language suggesting this new aspect of Justice Powell's test was neither adopted by a majority of the Court in *Wygant*, nor necessary to the result under any of the opinions in that case.[18] Nevertheless, as the opin-

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[16] Justice O'Connor's discussion of *Wygant* in *Johnson*, 107 S.Ct. at 1462, contrasts "societal discrimination" with "past and present discrimination *by the employer*" (emphasis added). Since prime contracting firms are employers, Justice O'Connor's test in *Johnson* could be satisfied under the facts here without discrimination by the City.

[17] According to Justice Powell, the "role model theory" has "no logical stopping point" and would allow the Board to discriminate "long past the point required by any legitimate remedial purposes." He also believed it could be used to "escape the obligation to remedy" relevant statistical imbalances indicative of discrimination. 476 U.S. at 275-76.

[18] Because of the status of the record and the proceedings below, all three opinions supporting the result rested not on the absence of a finding that the School Board had itself discriminated, but on the inappropriate nature of the remedy. 476 U.S. at 278

ion below illustrates, the *Wygant* dicta has had an impact on the courts of appeal.[19]

Neither the Fourth Circuit nor any other court overturning a set-aside plan on the basis of the *Wygant* dicta has explained how limiting States and localities to curing their own identified discrimination, as opposed to identified discrimination by others, would improve the balance between the competing interests involved. This Court should now reject that restriction.

The Fourth Circuit suggests that the limitation serves some purpose in preserving the "line between remedial measures and political transfers," 822 F.2d at 1360, but does not explain what, if any, additional protection the new limitation adds to the requirement that the discrimination to be cured be "identified." The Court's justification ignores identified discrimination by others and assumes that the only alternative to discrimination by the locality itself is unidentified "societal discrimination."

The Fourth Circuit's attempt to distinguish *Fullilove* on the basis of "the special competence of Congress," 822 F.2d at 1360, turns the structure of the Constitution on its head. While Congress must find an affirmative basis for its authority in the Constitution,[20] the Constitution leaves States free to exercise all powers subject to expressed limitations. Although Congress needed special authorization to pass legislation enforcing the equal protection guarantees of the Fourteenth Amendment, the

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(plurality); *id.* at 293-94 (O'Connor, J., concurring in part and in judgment); *id.* at 294-95 (White, J., concurring in judgment).

[19] *See, e.g., Michigan Road Builders Ass'n, Inc.* v. *Milliken*, 834 F.2d 583, 589-90 (6th Cir. 1987); *Assoc. Gen. Contr. of Cal.* v. *City & County of S.F.*, 813 F.2d 922, 929-30 (9th Cir. 1987).

[20] This special need to explain the basis of federal authority accounted for extended discussion in *Fullilove*. 448 U.S. 473-80 (plurality); *id.* at 499-502 (Powell, J.).

States needed no such special authority. *Bakke*, 438 U.S. at 368 & n.44 (Brennan, White, Marshall, Blackmun, JJ.).[21]

The District Court here held that Richmond's action was authorized under state law, J.S. Supp. App. 141-55, and the Fourth Circuit affirmed, 779 F.2d at 181, 184-186 (1985). Although the Fourth Circuit's opinion was vacated by this Court and remanded in light of *Wygant*, the fact that the Court of Appeals reached the federal constitutional issue in its remand opinion indicates that its position on the state law issues has not changed.[22]

In sum, the Constitution permits Richmond to exercise the power delegated to it by the State to enact a minority set-aside plan as a remedy for past discrimination by others without a threshold showing of its own participation in that discrimination.

B. State and Local Governments Participate in Discrimination When They Award Contracts to a Construction Industry Characterized by Discrimination.

Assuming *arguendo* that the Fourteenth Amendment limits a city's authority to remedying discrimination in which the city itself has participated, the Richmond plan should nevertheless be approved. A local government becomes a participant in discrimination when it awards contracts to companies in an industry characterized by discrimination.

Richmond has a special interest in curing, at least in the context of public contracting, the effects of past dis-

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[21] *See* Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753 (1985).

[22] *See Schmidt* v. *Oakland Unified School Dist.*, 457 U.S. 594 (1982), *vacating and reversing* 662 F.2d 550 (9th Cir. 1981) (lower court improperly failed to consider authority of locality under state law prior to reaching federal constitutional question).

crimination by those in the construction industry. In the absence of such curative action, Richmond's "facially neutral" awards of public contracts inevitably perpetuate the effects of past discrimination. This Court in *Fullilove* recognized the importance of eliminating such state involvement. Chief Justice Burger stated: "[C]ongressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *cf. City of Rome* [v. *United States*, 446 U.S. 156, 176-77 (1980)]." 448 U.S. at 477 (plurality). He emphasized that "traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," and approved a minority set-aside program "to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws." *Id.* at 478.

Subsequent cases have recognized the States' interest in ensuring public access to commercial opportunities—including those in the private sector—free from the taint of discrimination. *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International* v. *Rotary Club of Duarte*, 107 S.Ct. 1940 (1987). States have an even greater interest in assuring nondiscriminatory access to commercial opportunities they themselves provide.

A governmental entity that participates in "business as usual" by awarding public contracts with knowledge of discrimination in the industry performing them violates the Fourteenth Amendment. The entity under such circumstances is a "joint participant in a pattern of racially discriminatory conduct. . . ." *Ethridge* v. *Rhodes*, 268 F. Supp. 83, 87 (S.D. Ohio 1967). There the court granted an injunction against a state construction project because minorities "will not be able to get jobs." *Id.*

Although it was the union that refused to refer blacks, the court rejected the state's defense that there was no state action:

> "[W]hen a state has become a joint participant in a pattern of racially discriminatory conduct by placing itself in a position of interdependence with private individuals acting in such a manner—that is, the proposed contractors acting under contract with unions that bar Negroes—this constitutes a type of 'state action' proscribed by the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, [365 U.S. 715 (1961)]. Thus, . . . where a state through its elected and appointed officials, undertakes to perform essential governmental functions—herein, the construction of facilities for public education—with the aid of private persons, it cannot avoid the responsibilities imposed on it by the Fourteenth Amendment by merely ignoring or failing to perform them." *Id.*

Other courts have accepted the "state action" theory articulated in *Ethridge. Nat. Black Police Ass'n, Inc.* v. *Velde*, 712 F.2d 569, 580-83 (D.C. Cir. 1983) (federal agency had constitutional duty to terminate funds to local agencies known to be engaging in discrimination); *Percy* v. *Brennan*, 384 F. Supp. 800, 811-12, (S.D.N.Y. 1977) (government acquiescence in racially discriminatory practices by construction industry is a statutory and constitutional violation).

Limiting the power of States and localities to remedy the effects of past discrimination to those situations where the entity has itself discriminated does not measurably advance the goals of equal protection. This Court should recognize that, at the very least, governments are not barred from attempting to free their own public contract awards from the taint of discrimination, whether their own or that of the industry that bids on the contracts.

II. THE FOURTH CIRCUIT IMPROPERLY HELD THAT RICHMOND HAD NO FIRM BASIS FOR BELIEVING REMEDIAL ACTION WAS REQUIRED.

We have considered the kinds of discrimination that can justify a set-aside plan. We now examine the support for a conclusion that discrimination of the requisite nature existed here.

The District Judge determined after review of the applicable law and the evidence before him that

> "the evidence before the City Council when it enacted the ordinance supports the conclusion that participation of minority businesses in the Richmond area construction industry in general, and the City's construction contracting in particular continues to be adversely affected by past discrimination." J.S. Supp. App. 163-64.

Although the District Court unambiguously found discrimination in the construction industry, *id.* at 163, its findings are less explicit with respect to intentional discrimination by the City itself (aside from the City's perpetuation of discrimination by others through its public contracting). At the time of its decision, *Wygant* had not been decided and more precision on this issue was unnecessary.

The Fourth Circuit on remand held the plan unconstitutional because the record failed to satisfy the requirement, derived from the *Wygant* dicta, for evidence that the plan was adopted to cure the City's own discrimination. Rather than remanding to allow the District Court to consider the case under this new standard, the majority resolved the factual issues under that standard itself, without briefing by the parties. 822 F.2d at 1358-60. In contrast, the dissent concluded that "the Richmond Council had a firm basis for believing it had engaged in past discrimination in awarding public contracts." *Id.* at 1364.

This Court's determination of the kinds of discrimination that can justify a set-aside plan will frame the

relevant evidentiary issues. If this Court holds that Richmond was permitted to adopt a set-aside remedy to avoid perpetuating through award of public contracts the effects of past discrimination in the construction industry, then the District Court's finding quoted above should be adequate to support that purpose. That finding should be affirmed unless clearly erroneous. Alternatively, if this Court should require that the City itself discriminated, the Court would have to determine whether the District Court made an adequate finding on that issue. If so, that finding should be upheld unless clearly erroneous. If not, the case should be remanded to the District Court for reconsideration in light of the standard announced by the Court.

Regardless of how this Court resolves the issues in Part I, the Fourth Circuit's treatment of the evidentiary issues was erroneous. The Court of Appeals violated three principles derived from this Court's prior cases that should govern consideration of the evidentiary issues in this case: (1) to preserve the incentive for voluntary remedial action by a party in jeopardy of suits from opposing sides, contemporaneous self-incriminatory findings will not be required;[23] (2) legislative action does not require record support of the formality necessary to sustain judicial or administrative action;[24] and (3) the district

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[23] The adverse impact on incentives for voluntary action "cannot . . . be justified by reference to the incremental value a contemporaneous findings requirement would have as an evidentiary safeguard". *Wygant*, 476 U.S. at 289-91 (O'Connor, J., concurring). *See Bakke*, 438 U.S. at 364 (Brennan, White, Marshall, Blackmun, JJ.); *Johnson*, 107 S.Ct. at 1450-51. Accordingly, the Court has required at most a "firm basis for concluding that remedial action was appropriate." *Wygant*, 476 U.S. at 292-93 (O'Connor, J.); *id.* at 277 (plurality).

[24] *Fullilove*, 448 U.S. at 478 (plurality); *id.* at 502 (Powell, J.). Rather than "confin[ing] its vision to the facts and evidence adduced by particular parties," a legislative body has the "broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Id.* at 502-03. The "information . . . expertise [and] experience" of legislators are an

court plays the dominant role in finding facts.[25]

A. The District Court's Finding that the City Had Adequate Support for Believing that Its Public Contracting Awards Were Perpetuating Effects of Discrimination Should Be Sustained.

If this Court holds that the Constitution permits Richmond to take affirmative action either to cure the effects of discrimination in the construction industry or to prevent the perpetuation of those effects through award by the City of public contracts, it will then have before it a clear finding by the District Court, *supra*, p. 16, that the City Council had sufficient support for either purpose. That finding is not "clearly erroneous"; indeed, it is clearly correct.

1. The Council had before it a striking statistical disparity: from 1978 to 1983, less than 1% of city construction contracts, a figure approaching "the inexorable

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"appropriate source." *Id.* at 503. *See Ohio Contractors Ass'n* v. *Keip*, 713 F.2d 167, 171 (6th Cir. 1983) (legislators deemed to be aware of prior judicial findings, executive investigations and prior legislative work regarding discrimination); *Southwest Washington Chap., Nat'l Elec. Contr. Assn.* v. *Pierce Cnty.*, 667 P.2d 1092, 1100 and n.2 (Wash. 1983) (recognizing that the work of local legislative bodies occurs at meetings and conferences but that local bodies "cannot be expected to undertake the expense of detailed recordkeeping comparable to Congress").

[25] A district court's determination whether or not discrimination occurred is a finding of fact subject to F. R. Civ. P. 52(a), and must be affirmed unless "clearly erroneous" or based on an incorrect legal standard. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 (1982). When the district court either fails to make necessary findings or makes findings that are infirm because of an error of law, a remand is "proper unless the record permits only one resolution of the factual issue." *Id.* at 291-92. A determination whether a legislative body had a sufficient basis for believing discrimination justifying affirmative action had occurred differs from a court's determination that discrimination occurred. But the district court's role is essentially the same—weighing the evidence according to appropriate legal standards—and the same institutional considerations apply. *See Anderson* v. *Bessemer City*, 470 U.S. 564, 574-75 (1985).

zero," [26] were awarded to minority contractors in a city with a 50% minority population. The Fourth Circuit rejected this statistical evidence, characterizing the disparity as "spurious": "[t]he appropriate comparison is between the number of minority contracts and the number of minority *contractors* . . . ." 822 F.2d at 1359 (emphasis in original).

Wygant, upon which the Fourth Circuit relied heavily, is readily distinguishable. There, this Court rejected the statistical relationship between minority teachers and minority students as a basis for a plan protecting minorities from lay-offs. As this Court recognized, that statistical relationship was not relevant to whether there had been discrimination against minority teachers. 476 U.S. at 274-76.[27]

By contrast, a comparison of the percentage of public contracts awarded to minorities with the percentage of minorities in the general population is relevant to a determination whether discrimination has occurred. Comparisons to groups narrower than the general population may as a general rule be preferable as evidence of discrimination. Nevertheless, where racial discrimination at the "entry level" has thwarted the development of minority businesses or prevented minorities from acquiring skills, this Court has approved the use of general population statistics as a proxy for the number of minorities that would be present in the more narrowly defined population but for the effects of present and past discrimination. *See Teamsters* v. *United States*, 431 U.S. 324,

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[26] *Johnson*, 107 S.Ct. at 1465 (O'Connor, J.), citing *Teamsters* v. *United States*, 431 U.S. 324, 342, n.23 (1977).

[27] Papers before this Court in *Wygant* indicated that in 1972, the percentage of minority students, 16%, was dramatically higher than the percentage of minorities in the general community population, about 4%. Minority teachers in 1972 represented 8% of the faculty and thus exceeded the minority representation in the community. Brief of *amicus* Anti-Defamation League in *Wygant*, pp. i, 12-13.

339-40 & n. 20 (1977); *Steelworkers* v. *Weber*, 443 U.S. 193, 198-99 (1979); *id.* at 215 (Blackmun, J., concurring); *Johnson* v. *Transp. Agency, Santa Clara Cty., Cal.*, 107 S. Ct. 1442, 1450 (1987), *id.* at 1462-1463 (O'Connor, J., concurring); *United States* v. *Paradise*, 107 S. Ct. 1053, 1065 & n. 19 (plurality). Thus, in *Fullilove* itself, this Court accepted Congress' comparison of the percentage of contracts awarded minority contractors, 1%, with the percentage of minorities in the general population, 15-18%, as "evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises." 448 U.S. at 478 (plurality).

This Court has accordingly avoided the "gross anomaly" pointed out by the dissent below—"a proof scheme requiring a comparison of the percentage of contracts awarded with this small qualified pool of minority contractors would ensure the continuation of a systematic *fait accompli*, perpetuating a qualified minority contractor pool [that reflects discriminatory barriers to entry]." 822 F.2d at 1365 & n.11. *See Johnson*, 107 S.Ct. at 1462 (O'Connor, J.).[28]

Similar concerns have led the Office of Federal Contracts Compliance Programs ("OFCCP") of the U.S. Department of Labor, the agency charged with assuring non-discrimination by federal contractors, to use the percentage of minorities in the general population as the basis for setting affirmative action employment goals to be met by federal construction contractors. 45 Fed. Reg. 65976 *et seq.* (Oct. 3, 1980). Various contractors ob-

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[28] Other communities have used comparisons with the minority population in assessing the need for remedial set-asides. *See, e.g., South Fla. Chap.* v. *Metropolitan Dade County, Fla.*, 723 F.2d 846, 855 (11th Cir. 1984) (citing disparity between percentage of black county contractors (1%) and the county's general black population (17%)); *Schmidt* v. *Oakland Unified School Dist.*, 662 F.2d at 559 ("statistical disparity between the sizeable minority population of the community and the meager extent" of minority participation in public contracts).

jected to establishment of goals on an industry-wide basis reflecting general population statistics, and made arguments similar to those accepted by the Fourth Circuit:

> "Contractors contended that the minority goals should be by individual trade/craft rather than a single goal for all crafts because to do otherwise ignores the unavailability of minority construction workers, both skilled and unskilled, and makes it virtually impossible for contractors to meet the goal." *Id.* at 65983.

The OFCCP rejected this argument, relying on *Weber*:

> "the single goal concept is predicated upon the proposition that had it not been for the long-standing exclusion of minorities from the skilled construction crafts, minorities would be represented in those crafts at least to the extent of their representation in the total labor force in a given geographical area. (See *United States Workers of America* v. *Weber*, 443 U.S. 193)." *Id.*

2. The District Court, as did the Council, weighed as well other evidence indicating discrimination in the construction industry. The Court of Appeals characterized that other evidence as "meager," consisting of "some conclusory and highly general statements." 822 F.2d at 1358. This characterization exemplifies the kind of overly-technical factfinding requirements condemned by this Court in *Fullilove*. 448 U.S. at 478-80 (plurality); *id.* at 502-03 (Powell, J.).[29]

As described in detail in the Statement, *supra*, pp. 2-5, the Council's framing and adopted of the set-aside plan

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[29] *See also Wygant*, 476 U.S. at 289-91 (O'Connor, J). It is revealing to compare Judge Wilkinson's majority opinion on remand with his dissent, which is more explicit about requiring "detailed factual findings." *E.g.*, 779 F.2d at 204. While the later opinion acknowledges the principles noted at pp. 17-18, *supra*, 822 F.2d at 1359, its approach to the record belies its words.

were informed by the hearing proceedings[30] and by the studies of Council members and city administrators and their wealth of experience with the extent and effects of prior segregation and discrimination in Richmond. This experience and evidence either were not considered or were rejected by the Fourth Circuit as "nearly weightless." 822 F.2d at 1359.

In evaluating the Council's action, the District Court took judicial notice of the congressional findings of discrimination in the construction industry detailed by this court in *Fullilove*. J.S. Supp. App. 165-166.[31]

3. In sum, there is more than adequate support for the District Court's finding that Richmond had sufficient evidence to believe its action was necessary to cure the effects of discrimination in the construction industry, and, in particular, the perpetuation of those effects in the awarding of public contracts.

B. The Council Had a Reasonable Basis To Believe that the City Itself Had Discriminated.

If this Court should hold that in order to justify the set-aside plan, Richmond must demonstrate that there was a reasonable basis for believing that the City itself had discriminated, the existence of the requisite evidence and finding is not so clear. Two factors explain the am-

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[30] Opponents of the ordinance had reviewed the proposed setaside and prepared for the Council debate in advance. Two construction industry organizations had retained counsel from a prominent Richmond law firm to present their case to the Council. J.A. 19.

[31] Pervasive discrimination and racial exclusion in the construction industry have been so well documented by courts that this Court has found them to be a proper subject for judicial notice. *Weber*, 443 U.S. at 198 & n.1 ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice."). *See also Grant* v. *Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980); *Local Union No. 35 of IBEW* v. *Hartford*, 625 F.2d 416 (2d Cir. 1980); *Denton* v. *Boilermakers*, 650 F.Supp. 1151 (D. Mass. 1986).

biguity of the existing record and the District Court's findings on the issue of the City's own discrimination: members of the Council were reluctant to incriminate themselves or the City.[32] and the precedents available to the Council and the District Court did not require any finding that the City itself had discriminated in order to justify such a program. See, *supra*, pp. 8-15.

Nevertheless, the District Court's finding that "the City's construction contracting in particular continues to be adversely affected by past discrimination," J.S. Supp. App. 164, could be read to mean that the City itself had discriminated. The dissent below so concluded.[33] To find that discrimination by the City itself played no role in the past exclusion of minority contractors from public

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[32] One Council member expressed fear that adoption of a remedial program would expose the City to liability for past discrimination (J.A. 15):

> "CITY ATTORNEY: No, I don't feel that we're exposing ourselves to liability, but the Supreme Court, when it approved the ten percent minority set-aside, specifically said that the justification was that it was remedial. We've reviewed the statistics of the construction contracts, and it certainly justifies that. We have tried to tailor this ordinance as closely to the federal ordinance, which was—or federal statute, which was upheld by the Supreme Court, as possible. And, yes, it is remedial. I don't think that's exposing us to any liability for prior acts.
>
> "COUNCIL MEMBER: . . . Doesn't the word remedial mean to make special efforts at the moment and in the near future to make up for prior deficiencies?
>
> "CITY ATTORNEY: Yes. In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is there are statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case. . . . And they allowed more use of broader statistics than they do in a lot of cases. I'm not saying that we have discriminated in any individual case in the past."

[33] "The conclusions that emerged from the Council's debate concerned the City's previous discrete discrimination in awarding contracts for public construction projects." 822 F.2d at 1366.

contracts would require closing one's eyes to the history of Richmond's pervasive purposeful discrimination that was all too familiar to the Council members.[34]

Should the Court conclude that the District Court's findings cannot be read to support the City's belief in its own discrimination, the proper course would be to remand to the District Court for appropriate findings under the new standard imposed by the Court. *See Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-92 (1982).

III. THE RICHMOND PLAN IS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL GOAL OF ENDING RACIAL EXCLUSION IN PUBLIC CONTRACTING.

We now consider the third criterion for evaluating the constitutionality of Richmond's set-aside ordinance: the requirement that the plan be "narrowly tailored to the achievement of [its] goal." *Fullilove*, 448 U.S. at 480 (plurality). In his concurrence in *Fullilove*, Justice Powell cautioned that this requirement does not restrict a legislature to the "least restrictive" alternative. *Id.* at 508. Rather, the legislature's "choice of a remedy should be upheld . . . if the means selected are equitable and reasonably necessary to the redress of identified discrimination." *Id.* at 510. Justice Powell described the measure of discretion accorded Congress "to choose a suitable remedy for the redress of racial discrimination" as similar to judicial discretion in choice of remedies—a balancing process left to the sound discretion of the trial court. *Id.* at 508, citing *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 794 (1976) (Powell, J. concurring in part and dissenting in part). *See also Paradise*, 107 S.Ct. at 1073-74 (plurality).

This Court has generally considered the five factors, originally identified by Justice Powell, in deciding whether a remedy is properly tailored: "(i) the efficacy

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[34] *See City of Richmond* v. *United States*, 422 U.S. 358 (1975); *Bradley* v. *School Board*, 462 F.2d 1058 (4th Cir. 1972); *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam).

of alternative remedies . . ., (ii) the planned duration of the remedy . . .," (iii) "the percentage chosen for the set-aside . . .," (iv) "the availability of waiver . . .," and (v) "the effect of the set aside upon innocent third parties." *Fullilove*, 448 U.S. at 510-14. *See Paradise*, 107 S.Ct. at 1067; *Johnson*, *supra*. The Fourth Circuit misapplied these factors in reaching its alternative holding that Richmond's program was not adequately tailored.

A. The City Council Considered Alternatives.

This Court in *Fullilove* indicated that Congress' experience with other unsuccessful remedies demonstrated that it had adequately considered alternatives.

> "By the time Congress enacted [the set-aside] in 1977, it knew that other remedies had failed to ameliorate the effects of racial discrimination in the construction industry. Although the problem had been addressed by antidiscrimination legislation, executive action to remedy employment discrimination in the construction industry, and federal aid to minority businesses, the fact remained that minority contractors were receiving less than 1% of federal contracts." 448 U.S. at 511 (Powell, J.).

Similarly, the Richmond Council had tried an antidiscrimination provision. In place since 1975, this prohibition on discrimination in award of public contracts had not affected the barriers to entry preventing minority participation in public contracting. On the other hand, the Council was advised that a set-aside used in the community development block grant program had had more favorable results. See pp. 4-5, *supra*. The record shows that, based on their past experience, the council members selected a remedy they believed held more promise of success than other alternatives.[35]

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[35] Because the set-aside effectively requires non-minority contractors to work with MBEs, it is the only alternative which may overcome "lack of confidence in minority business ability or racial

B. The Set-Aside Program Is Limited in Duration.

The set-aside adopted by Richmond is a temporary measure, expiring on June 30, 1988, five years after it became effective. J.S. Supp. App. 247-48. The Fourth Circuit treated the automatic expiration as something less than automatic—"[w]hether the Richmond plan will be retired or renewed in 1988 is . . . nothing more than speculation." 822 F.2d at 1361.

The duration factor is used to guarantee that the program in question is a temporary remedy to cure the effects of past discrimination rather than a permanent mechanism to maintain racial balance. In *Johnson* and *Weber*, this Court approved affirmative action plans as remedial and temporary in operation even though the plans contained no specific termination dates. *Johnson*, 107 S.Ct. at 1456; *Weber*, 433 U.S. at 208-09. By contrast, the Richmond plan is explicitly temporary. See p. 4, *supra*.

C. The Council Selected a Reasonable Figure for the Set-Aside Percentage.

Richmond established a 30% set-aside goal based on a 50% general minority population. The Fourth Circuit criticized the 30% goal as arbitrary. 822 F.2d at 1360. This criticism is unfounded.[36]

In establishing the 30% goal, Richmond applied Justice Powell's approach in *Fullilove* to the local circumstances. Justice Powell approved "[t]he choice of a 10% set-aside [falling] roughly halfway between the present percentage of minority contractors and the percentage of

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prejudice and misconceptions." *Constructors Assoc. of Western Pa.* v. *Kreps*, 441 F. Supp. 936, 953 (W.D. Pa. 1977).

[36] Judge Sprouse, dissenting, said that "judging the set-aside percentage by referring to the small proportion of existing MBEs in the economy would perpetuate rather than alleviate past discrimination." 822 F.2d at 1367.

minority group members in the Nation." 448 U.S. at 513-14. Although the specific number of minority contractors in Richmond is not contained in the record, the City Council was informed by the representatives of the construction industry who testified on the plan that there were few. J.A. 27, 33-36, 40, 44. The 30% figure falls roughly halfway between the minority participation rate, below 1%, and the minority population of 50%.[37]

Buttressing the reasonableness of the percentage chosen by the Council is the related action of the OFCCP which set employment goals for the construction industry substantially equal to the minority population percentage. See p. 21, *supra*.

D. The Richmond Plan Provides for an Adequate Waiver.

In order to assure that its plan was flexible, Richmond incorporated a waiver provision.[38] A non-minority contractor may obtain a waiver of the 30% subcontracting requirement on a showing that despite best efforts there are no minority subcontractors available or willing to participate. The District Court, applying *Fullilove* found the waiver sufficient to protect against rigid application. J.S. Supp. App. 175-93.

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[37] *See Southwest Washington Chap.* v. *Pierce Cnty., supra*, 667 P.2d at 1101 (approved MBE goal "slightly less than the minority population in Pierce County"); *Schmidt* v. *Oakland Unified School Dist., supra*, 662 F.2d at 559 (approving 25% MBE goal where city population was 34.5% minority).

[38] The standard for waiver is as follows:

> ". . . it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises (which can perform subcontracts or furnish supplies specified in the contract bid) are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." J.S. Supp. App. at 68.

The Fourth Circuit rejected the waiver because it is limited to " 'exceptional circumstances,' " and is a matter of "administrative discretion" and because the prime contractor bears the "burden of obtaining the waiver." 822 F.2d at 1361. The Richmond "waiver provisions were purposely drawn to parallel those approved in *Fullilove*," 822 F.2d at 1367 (Sprouse, J., dissenting), and the waiver approved in *Fullilove* was also available only "under exceptional circumstances." *Compare* J.S. Supp. App. 67 *with* 448 U.S. at 494. In *Fullilove*, as here, the waiver decision was an exercise of administrative discretion. *Id.* at 468-72. Finally, in each case the entity responsible for complying with the percentage set-aside (*i.e.*, the State or locality in *Fullilove* and the contractor here) is the entity that may seek the waiver. J.S. Supp. App. at 189. In sum, the *Fullilove* standard was followed and the contractors are given "the opportunity to demonstrate that their best efforts" will not achieve the "target for minority firm participation." 448 U.S. at 488 (plurality).

E. The Burden on Non-Minorities Is Consistent with Fundamental Fairness.

Inherent in the set-aside concept is the "[f]ailure of non-minority firms to receive certain contracts . . ., an incidental consequence of the program." *Id.* at 484 (plurality). This burden is to be assessed to determine whether "the effect of the set-aside is limited and so widely dispersed that its use is consistent with fundamental fairness." *Fullilove*, *Id.* at 515; *Wygant*, 476 U.S. at 282-83. The Fourth Circuit erroneously concluded that the Richmond set-aside "imposes an overbroad competitive burden on non-minority businesses." 822 F.2d at 1361.

The burden imposed by the Richmond set-aside is limited in scope and duration. The set-aside applies only to subcontracts and not to prime contracts. Since it applies to all non-minority contractors, the burden is shared by

many. Those who share this limited burden inevitably include many who benefitted from prior discrimination. Because these contracts represent only a fraction of construction projects, the set-aside affects "only one of several opportunities." [39] *Wygant*, 476 U.S. at 283.

Finally, this set-aside, unlike the lay-offs disapproved in *Wygant*, does not disturb any "firmly rooted expectation." *Johnson*, 107 S. Ct. at 1455.

In sum, review of the Richmond set-aside plan in light of the five factors articulated by this Court compels the conclusion that the ordinance was narrowly tailored to achieve its remedial purpose.

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[39] Using census data, the City in its brief to this Court has calculated that city projects accounted for only 10% of all construction contracts during 1978 to 1983. The set-aside thus affects only three percent of local contracting opportunities. Because nonminorities can participate as a 49% owner in an MBE or can form a 51%-49% joint venture with an MBE and still receive a set-aside, the opportunities affected are reduced even further.

CONCLUSION

For the reasons stated above, we urge the Court to reverse the decision below of the Court of Appeals for the Fourth Circuit and uphold the Richmond Minority Business Utilization Plan as constitutional.

Respectfully submitted,

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